THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0171, Michael Scanlan & a. v. Town of Hampton, the court on October 31, 2007, issued the following order:

The motion to dismiss plaintiffs Daniel and Pauline Traficante and to strike their brief is granted in part. Because the Traficantes have transferred the property that provided them standing to pursue this zoning appeal, we dismiss them as parties. Inasmuch as the remaining plaintiffs expressly joined in their brief, however, we deny the request to strike it. We grant the motion of the remaining plaintiffs to change the caption of this appeal, which shall now and hereafter be Michael Scanlan & a. v. Town of Hampton.

The plaintiffs appeal from an order of the superior court upholding a decision of the Town of Hampton Zoning Board of Adjustment (ZBA) to grant several variances. "Factual findings of the ZBA are deemed prima facie lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007) (quotation omitted). We uphold the trial court's order unless it is unsupported by the evidence or legally erroneous. See id. Finding no error upon this record, we affirm.

The property at issue consists of five contiguous parcels in the area of Hampton Beach, three of which front the beach on Ocean Boulevard between J Street and K Street; the remaining two are on J Street and K Street. In 1999, a fire destroyed several buildings on the parcels, and the property today remains largely vacant. The intervenor holds options from the owners of four of the five parcels, and from the lessee of the fifth parcel.

The intervenor seeks to build a forty-two unit condominium building with retail space on the ground floor and two levels of parking. For the project, the intervenor obtained variances from: (1) the minimum lot area per dwelling unit; (2) the maximum height; (3) the maximum amount of sealed surface; (4) the minimum amount of recreation area; (5) the minimum lot line setback; and (6) the minimum open space buffer along site boundaries.

The parties agree that these are "area variances," requiring the applicant to prove: (1) the variance is not contrary to the public interest; (2) the variance is needed to enable the proposed use given special conditions of the property, and the intended benefit cannot be achieved by some other reasonably feasible

means; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is accomplished; and (5) surrounding property values are not diminished. Boccia v. City of Portsmouth, 151 N.H. 85, 94 (2004). The plaintiffs, who are abutters, challenge each element on the merits, and assert several alleged procedural errors. We address the procedural issues first.

The plaintiffs argue that the ZBA should have voted upon each variance as to each parcel separately. Instead, the ZBA treated the parcels collectively as the "property," and voted only once upon each Boccia element.

An administrative body, such as a ZBA, generally has broad discretion over the conduct of its proceedings. See Appeal of Basani, 149 N.H. 259, 264 (2003). Moreover, nothing in RSA 674:33 (Supp. 2007) or Boccia requires a ZBA to decide a variance application seeking multiple variances in the manner advanced by the plaintiffs. Here, where the application involved a single project pursued by a single developer comprised of a single structure to be built on all five parcels, the ZBA was not compelled to render separate Boccia findings for six separate variances, and could properly consider the "property" for purposes of Boccia as the collective parcels.

The plaintiffs also argue that because one of the five parcels is leased from the town, and because the town is not an applicant, the lessee lacked standing to seek a variance. See Conery v. Nashua, 103 N.H. 16, 21 (1960). Conery and its progeny are grounded upon the supposition that RSA 674:33, I(b), was intended to protect the owner, and not merely the holder of an option, from unnecessary hardship. See Welch v. Nashua, 108 N.H. 92, 93 (1967).

Here, the ZBA's instructions for variance applications allow either the owner or the holder of an option to apply for a variance. The plaintiffs do not challenge the validity of this regulation. Moreover, counsel for the town asserted at trial that pursuant to legislation creating the town's "leased land sales program," the lessee has the right to purchase the property. The record supports this assertion, and the trial court's ruling that the lessee thus has an option to purchase the parcel. Finally, the lessee did not simply have an option, but executed a twenty-year recorded lease which obligated it to pay property taxes "as if the Lessee were the owner," and entitled it to assign the lease "to any bank . . . as collateral security for a mortgage upon the premises of the Lessee." Under these circumstances, the lessee could seek variances.

The plaintiffs next argue that the trial court improperly analyzed unnecessary hardship under Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001), rather than under Boccia. The record belies this argument. The record likewise belies the plaintiffs' argument that the trial court "abdicated its appellate authority." Both the trial court's order and its granting

of requested findings of fact and conclusions of law demonstrate that it properly exercised its appellate authority and applied Boccia.

Turning to the merits of the variances, the record supports the trial court's finding that the variances are needed to enable the proposed use given special conditions of the property. The ZBA could properly find that the property was unique in its setting given that, as a collection of parcels, it was significantly larger than many surrounding lots, and has been rendered substantially vacant. See, e.g., Rancourt v. City of Manchester, 149 N.H. 51, 54 (2003). To the extent the plaintiffs argue that any hardship is "self-created" because the intervenor acquired options with knowledge of the ordinance, we cannot conclude that this hardship, precipitated by a catastrophic fire and the desire of the current owners and lessee to redevelop the land, is "self-created."

The record also contains sufficient proof to support the trial court's finding that without the variances, it would not be economically feasible to construct a multi-family use. See Malachy Glen Assocs., 155 N.H. at 108. To the extent the plaintiffs suggest that "a less intensive use . . . might be feasible . . . either without variances or with less egregious deviations from the ordinance," we note that the ZBA is obligated to "look at the project as proposed by the applicant, and may not weigh the utility of alternative uses in its consideration of the variance application." Id.

Under the requirements that a variance comply with the spirit of the zoning ordinance and not conflict with the public interest, the ZBA is to consider whether granting the variance would alter the essential character of the locality, or threaten public health, safety, or welfare. See id. at 105-06. The trial court specifically found, based upon a view, that "within the same block to the rear of the proposed construction, there are two large condominium buildings currently being built," and that "the character of the [area] is changing, with the emphasis being on new condominium construction." The plaintiffs do not challenge this finding. The trial court also found that the proposed project will result in a less dense use than that which existed prior to the fire, and the record does not compel a finding that the proposed project will otherwise threaten public health, safety, or welfare.

The "substantial justice" inquiry requires the ZBA to examine whether "any loss to the individual [by strictly enforcing the ordinance] . . . is . . . outweighed by a gain to the general public," and "whether the proposed development [is] consistent with the area's present use." Id. at 109 (quotation omitted). As noted above, the plaintiffs do not challenge the trial court's finding that the area is changing, and that the proposed use comports with this trend. Nor does the record compel a finding that denying the requested variances will result in any appreciable gain to the general public. See id.

With respect to the diminution of surrounding property values, the plaintiffs concede that the intervenor submitted an appraisal letter finding no evidence that the project would diminish the value of surrounding properties. The plaintiffs claim, however, that the letter was not supported by adequate data. It is generally within the competence of the ZBA to assess the weight of the evidence submitted. See Hannigan v. City of Concord, 144 N.H. 68, 74 (1999). We conclude that the appraisal letter submitted by the intervenor was sufficient to support the ZBA's finding.

Finally, we reject the plaintiffs' argument that because the intervenor asserted that certain towers on the proposed building were not essential, but were recommended by the Hampton Beach area commission for aesthetic purposes, see RSA 216-J:1 (Supp. 2007) (establishing Hampton Beach area commission to assist town in planning and implementation of Hampton Beach master plan), there was no hardship requiring a height variance, and the height variance was not consistent with substantial justice. The record indicates that the height variance was required for construction of the building even without the towers. Moreover, the record indicates that including the towers in the design was consistent with the Hampton Beach master plan.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk